MOTION FILED

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No. 95-714

In The

Supreme Court of the United States

October Term, 1995

NATIONWIDE MUTUAL INSURANCE COMPANY AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Petitioners,

v.

HENRY CISNEROS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; JERALD L. STEED, EXECUTIVE DIRECTOR, DAYTON HUMAN RELATIONS COUNCIL; CHARLES W. BROWN, CHAIRPERSON, DAYTON HUMAN RELATIONS COUNCIL; AND CITY OF DAYTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE A FRIEND OF THE COURT BRIEF and BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS FRIEND OF THE COURT IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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19

MOTION

The National Association of Insurance Commissioners moves for leave to file a Friend of the Court Brief in support of Petitioners, Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company. The Friend of the Court Brief is printed with this Motion in accordance with Rule 37 of the *Rules of the Supreme Court*.

ISSUE OF CONSENT

Mr. Joel W. Rice has consented, on behalf of Petitioners Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company, to the filing of a Friend of the Court Brief by the National Association of Insurance Commissioners. Mr. Ken Barden on behalf of Respondents Jerald L. Steed, Charles W. Brown, and City of Dayton refused to consent to the filing of the Friend of the Court Brief by the National Association of Insurance Commissioners, but stated that there was no objection to the filing. Consent has also been sought from The Honorable Drew S. Days III, Solicitor General. As of this date, no response has been received. If consent is granted, it will be filed with the Clerk of this Court as soon as practicable.

INTEREST OF MOVANT

The National Association of Insurance Commissioners (NAIC) is a nonprofit, unincorporated association

whose members are the principal insurance regulatory officials of the fifty states, the District of Columbia, territories and insular possessions of the United States. The NAIC seeks permission to file the attached Friend of the Court Brief in furtherance of its objectives to serve the public by assisting the several state insurance regulatory officials in improving state regulation of the business of insurance and promoting fair and equitable treatment of policyholders and claimants.

The ability of an insurer to engage in proper risk selection is a key aspect of an insurer's financial soundness. An insurer that fails to use appropriate risk selection techniques will soon find itself in financial trouble, to the detriment of policyholders and claimants relying on insurance coverage. This is due to adverse selection, in which insureds obtain coverage at too favorable a rate for the risk they represent. Since the insurer has not collected adequate premiums for these risks, claims soon exceed money available to pay those claims, leading to insolvency of the insurer.

The assertion of claims under the Fair Housing Act by the United States Department of Housing and Urban Development, especially under the so-called "disparate impact" approach, which requires no showing of discriminatory intent, makes impossible the operation of state laws establishing insurers' right to use rationally based, neutral risk selection techniques. Thus, the Court should grant the Petition for a Writ of Certiorari so that it may give full consideration to the impairment of state insurance laws caused by the claims made by the United States Department of Housing and Urban Development.

FOCUS OF BRIEFS

The Petition for Writ of Certiorari filed on behalf of Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company details the disagreement among Courts of Appeal as to whether the Fair Housing Act applies to the business of insurance and whether the impairment of state insurance laws by the Fair Housing Act is ripe for decision.

The Respondents' briefs have not been filed, but they will likely focus on supporting the decision of the U.S. Court of Appeals for the Sixth Circuit. It is likely that these briefs will urge deference to the United States Department of Housing and Urban Development's determination that it has jurisdiction over property insurance matters.

Other Friend of the Court briefs may be filed. These briefs are likely to support aspects of positions taken by the Parties to the case. One or more individual insurance regulators are likely to underscore that the assertion of jurisdiction by the United States Department of Housing and Urban Development impairs, invalidates, or supersedes state insurance laws.

The NAIC takes no position as to whether the Petitioners are motivated by discrimination against a protected class. The NAIC is concerned that issues involving risk selection by property insurers be resolved under Ohio insurance laws that allow rationally based, neutral risk selection criteria. The NAIC's brief explains that the ability of insurers to engage in risk selection is the very essence of the business of insurance. The NAIC's brief also explains why the application of the Fair Housing

Act, particularly using the "disparate impact" approach, impairs, invalidates, or supersedes state insurance laws designed to promote the solvency of insurers.

CONCLUSION

The NAIC respectfully requests permission to file the attached Friend of the Court Brief in support of Petitioners Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company.

Dated the 3rd Day of January, 1996

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Interest of Friend of the Court 1

Summary of Argument 2

Argument 3

I. The Petition for a Writ of Certiorari Should Be Granted to Reverse the Decision of the U.S. Court of Appeals for the Sixth Circuit and Preserve State Insurance Laws Which Protect the Solvency of Insurers by Promoting Proper Risk Selection 3

A. O.R.C. § 3901.21(M) is a state law regulating the business of insurance 4

B. The Fair Housing Act does not specifically relate to the business of insurance, and, therefore, cannot invalidate, impair, or supersede state laws that regulate the business of insurance 5

C. HUD's assertion of jurisdiction allows it to assert a "disparate impact" approach which impairs, invalidates, or supersedes state laws that prohibit unfair discrimination in insurance, but allow the use of rationally based, neutral risk selection techniques that promote the solvency of insurers 6

II. The Fact that the Fair Housing Act impairs, supersedes, or invalidates Ohio insurance laws is ready for decision by the Court 10

Conclusion 12

TABLE OF AUTHORITIES

Page

CASES

Group Life & Health Insurance Company v. Royal Drug Company, 440 U.S. 205 (1946) 4

Prudential Insurance Company v. Benjamin, 328 U.S. 408 (1946) 5

STATUTES

Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.* 1

McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.* ...1, 3

Ohio Rev. Code § 3901.11 1

Ohio Rev. Code § 3901.21(M) 1, 2, 4, 8

Ohio Rev. Code § 3929.41, *et seq.* 8

OTHER AUTHORITES

2 Am. Jur. 2d *Administrative Law* § 485 (1994) 10

Ettlinger, *State Insurance Regulation* 29-30 (1995) 7

Nationwide Petition for a Writ of Certiorari, pp. App. 144 to App. 152 6

INTEREST OF FRIEND OF THE COURT

The National Association of Insurance Commissioners (NAIC) is a nonprofit, unincorporated association whose members are the principal insurance regulatory officials of the fifty states, the District of Columbia, territories and insular possessions of the United States. The NAIC seeks permission to file the attached Friend of the Court Brief in furtherance of its objectives to serve the public by assisting the several state insurance regulatory officials in improving state regulation of the business of insurance and promoting fair and equitable treatment of policyholders and claimants.

Following a request from the Ohio Superintendent of Insurance, the Executive Committee of the NAIC, which consists of seventeen insurance commissioners from all regions of the country, voted to file a Friend of the Court Brief in this case in support of granting a Writ of Certiorari.

Insurance commissioners are charged by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 and 1012, as well as by their own state statutes, *e.g.*, Ohio Rev. Code (O.R.C.) § 3901.11, to regulate the business of insurance. Insurance commissioners regulate many different types of insurance and virtually every aspect of the business of insurance. This includes statutes designed to foster the solvency of insurers through the risk selection process such as O.R.C. § 3901.21(M), prohibiting unfair discrimination between individuals in the same classification having similar risks.

The Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.*, is being used by the United States Department of Housing and Urban Development (HUD) to assert claims that

Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company (collectively, Nationwide) are engaged in discrimination against a protected class, even though there is no showing that Nationwide's use of neutral risk selection criteria is motivated by this type of discrimination. While the NAIC takes no position as to whether Nationwide is motivated by discrimination against a protected class, the NAIC is concerned that issues involving risk selection by property insurers be resolved under Ohio insurance laws that allow rationally based, neutral risk selection criteria rather than a federal law that prevents Ohio laws from operating. The claims by HUD impair, invalidate, or supersede state laws such as O.R.C. § 3901.21(M) because they will stop insurers such as Nationwide from engaging in risk selection necessary to maintain insurer solvency, in the best interests of policyholders and claimants.

SUMMARY OF ARGUMENT

HUD's assertion of claims under the Fair Housing Act that permits use of the "disparate impact" approach is illegal under the McCarran-Ferguson Act. Ohio laws permit and encourage the use of rationally based, neutral risk selection criteria. This promotes insurer solvency through appropriate risk classification and accurate pricing of insurance. Ohio insurance laws also provide for the equitable allocation of risks rejected by the voluntary market through a FAIR plan.

These Ohio insurance laws are impaired, invalidated, or superseded by HUD's assertion of claims which utilize

the "disparate impact" approach. Ohio laws on risk selection and the equitable allocation of risks rejected by the voluntary market cannot be enforced if insurers are required to insure all applicants.

Lastly, the illegality of HUD's actions is ripe for consideration by the Court. HUD has issued numerous statements that it will apply the "disparate impact" approach in property insurance cases, a decision which is final for purposes of judicial review.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED TO REVERSE THE DECISION OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT AND PRESERVE STATE INSURANCE LAWS WHICH PROTECT THE SOLVENCY OF INSURERS BY PROMOTING PROPER RISK SELECTION

The Sixth Circuit's decision in this case impairs, invalidates, or supersedes Ohio insurance laws designed to foster insurer solvency through appropriate risk selection criteria. Thus, the Sixth Circuit's decision is in violation of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.* 15 U.S.C. § 1012 states that:

> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

This Court should grant the Petition for A Writ of Certiorari and reverse the Sixth Circuit's erroneous decision.

A. O.R.C. § 3901.21(M) is a state law regulating the business of insurance

Underwriting activities such as those in question in this case involve determining if an applicant for insurance is eligible to be insured, and if so, under what terms, conditions, and exclusions, and at what premium. This Court recognizes that these practices are at the very heart of the business of insurance. " . . . Congress understood the business of insurance to be the underwriting and spreading of risk." *Group Life & Health Insurance Company v. Royal Drug Company,* 440 U.S. 205, 221 (1979).

Thus, no one seriously contests that Ohio laws regulating the underwriting activities of Nationwide are state laws that regulate the business of insurance. O.R.C. § 3901.21(M) provides that:

> The following are hereby defined as unfair and deceptive acts or practices in the business of insurance:
>
> Making or permitting any unfair discrimination between individuals of the same class and of

> essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of insurance, other than life insurance, or in the benefits payable thereunder, or in underwriting standards and practices or eligibility requirements, or in any of the terms or conditions of such contract, or in any other manner whatever.

A state statute designed to regulate how insurers decide whom to insure and the form of the insurance contract cannot be anything other than a law that regulates the business of insurance.

B. The Fair Housing Act does not specifically relate to the business of insurance, and, therefore, cannot invalidate, impair, or supersede state laws that regulate the business of insurance

This Court has stated that

> Obviously Congress' purpose [in adopting the McCarran-Ferguson Act] was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, ***except as otherwise expressly provided in the Act itself or in future legislation.*** *Prudential Insurance Company v. Benjamin*, 328 U.S. 408, 429-430 (1946) (emphasis added).

The Fair Housing Act contains no express reference to insurance, and, therefore, cannot be an act of Congress that "specifically relates" to the business of insurance.

Thus, if the Fair Housing Act impairs, invalidates, or supersedes Ohio insurance laws, HUD cannot exercise jurisdiction over property insurance matters.

C. HUD's assertion of jurisdiction allows it to assert a "disparate impact" approach which impairs, invalidates, or supersedes state laws that prohibit unfair discrimination in insurance, but allow the use of rationally based, neutral risk selection techniques that promote the solvency of insurers

HUD is asserting claims that Nationwide is violating the Fair Housing Act even though Nationwide was not motivated by discrimination against a protected class, but was merely using neutral risk selection criteria permitted and encouraged under Ohio insurance laws. This impairs, invalidates, or supersedes those laws, interfering with state laws designed to promote the solvency of insurers. Therefore, HUD is applying the Fair Housing Act in violation of the McCarran-Ferguson Act.

The "disparate impact" approach, as described in HUD's own legal memoranda (Nationwide's Petition at App. 144 to App. 152), means that a facially neutral rule that disproportionately excludes members of a protected class can violate the Fair Housing Act even though the alleged violator was not motivated by discriminatory intent. This approach to enforcement of the Fair Housing Act impairs, invalidates, or supersedes Ohio insurance laws designed to promote insurer solvency through the application of neutral risk selection criteria.

The importance of state laws regulating underwriting is shown in Ettlinger, *State Insurance Regulation* at 29-30 (1995):

> Of concern to state insurance regulators is that improper underwriting can result in the following circumstances:
>
> - *An insurer could become insolvent.* Underwriting allows the insurer to analyze loss exposures to determine the likelihood and ultimate cost of any losses that might occur. Loss exposures can then be denied if they are too risky for the insurer to assume. Acceptable loss exposures are placed in the appropriate risk classification and charged the appropriate premium. If insurers often accept loss exposures when they should have denied coverage or if they frequently classify risky loss exposures as lower-risk loss exposures, insurers face financial loss, because premiums collected might be far below the amount needed to cover the losses that are incurred, and policyholders' surplus will have to be used to pay claims. If improper underwriting occurs frequently, an insurer's surplus can be drained to the point of insolvency of the insurer.
>
> - *An insured or potential insured could be improperly discriminated against.* In insurance, discrimination is not necessarily a negative term so much as a descriptive one. For insurance *fair* discrimination is not only permitted, but necessary. For example, an insurer can charge higher premiums for insureds with poor driving experience than for those with excellent driving records. However, *unfair* discrimination is not permitted.

> **Unfair discrimination** occurs when an underwriting decision is based on race, or in some states, sex. For example, in a state that does not allow discrimination based on sex, an insurer cannot charge a higher premium for a male driver than it does for a female driver who is otherwise at the same level of risk. Unfair discrimination also occurs when there is no statistical support for an underwriting decision. For example, an insurer cannot deny coverage to drivers of blue cars, because there is no data suggesting that the color of cars affects their level of risk. (Italics and bolding in original).

The assertion of claims which may use the "disparate impact" theory by HUD overthrows state laws such as O.R.C. § 3901.21(M) that allow insurers to use rationally based, neutral underwriting guidelines. These laws are swept aside and insurers exposed to punishment by the federal government even though they were merely using rationally based underwriting guidelines permitted and encouraged under state law to preserve insurer solvency.

Also destroyed by HUD's actions are state laws establishing Fair Access to Insurance Requirements (FAIR) plans, for example, O.R.C. §§ 3929.41, *et seq.* Virtually every state has a FAIR plan. Generally, they are designed to make basic property insurance available to applicants rejected by the voluntary insurance market so that risks which present a greater risk of loss may be allocated equitably among insurers authorized to transact property and casualty insurance in a state. This assures that business which represents a greater risk will not drive one or a few insurers into insolvency, but instead

the risk will be spread among all authorized property and casualty insurers.

Under the "disparate impact" theory available to HUD, this system is destroyed because risks cannot be rejected by the voluntary insurance market based on rational, neutral underwriting guidelines. Instead, an insurer must accept all applicants, without regard to effect it has on its solvency. This exposes individual insurers to the risk insolvency, a risk they avoid under FAIR plan laws such as Ohio's, which spreads the risk among all insurers, reducing the chance of insolvency.

Thus, the availability of the "disparate impact" approach invalidates, impairs, or supersedes state insurance laws and cannot be applied to Nationwide under the McCarran-Ferguson Act. Of what use is a law permitting and encouraging rationally based, neutral risk selection, if an insurer must insure all applicants? No use at all. Of what use is a law establishing a FAIR plan for the equitable distribution of risks rejected by the voluntary insurance market if that market is no longer voluntary because insurers must accept all applicants? None whatsoever. These laws have been impaired, superseded, or invalidated by HUD's assertion of the "disparate impact" approach.

HUD's sweeping aside of Ohio's unfair discrimination and FAIR plan laws show how state insurance laws intended to enhance insurer solvency are destroyed by HUD's claims, causing danger to policyholders and claimants. The Court should put an end to the impairment of Ohio insurance laws and the attendant danger to

policyholders and claimants by granting Nationwide's Petition and reversing the Sixth Circuit's decision.

II. THE FACT THAT THE FAIR HOUSING ACT IMPAIRS, SUPERSEDES, OR INVALIDATES OHIO INSURANCE LAWS IS READY FOR DECISION BY THE COURT

Acting on its own, the Sixth Circuit raised the issue of ripeness and erroneously decided this case was not ripe for decision since HUD had not yet applied the Fair Housing Act to Nationwide. In so doing, the Sixth Circuit was apparently unaware of or disregarded the fact that HUD applies the "disparate impact" approach to property insurance issues. There is no doubt as to HUD's intent to use the "disparate impact" approach to impair, invalidate, or supersede Ohio's insurance laws, making the Fair Housing Act's application to property insurance illegal under the McCarran-Ferguson Act. This makes HUD's action final and ready for judicial review.

Ripeness is the doctrine that the courts should avoid premature adjudication of issues to avoid entangling themselves in abstract disputes over administrative policies and avoid interference with administrative processes until a decision is formalized. In deciding whether a case is ripe for adjudication, the questions are whether the issues are appropriate for judicial resolution and an assessment of the hardship on the parties if judicial relief is denied at this stage. 2 Am. Jur. 2d, *Administrative Law* § 485 (1994).

Pre-enforcement judicial review is permissible to challenge a regulation or agency interpretation that has a

direct and immediate impact on a party bringing the challenge.

> For example, a rule of conduct which carries sanctions for its violation may be challenged directly in a separate proceeding. If a rule of conduct cannot be challenged in advance of violating it, persons subject to the rule are placed in a dilemma: comply with the rule that harms them and that they believe to be invalid or violate the rule at the risk of incurring a heavy penalty if they have guessed wrong and the rule is upheld in the penalty proceeding.
>
> * * *
>
> Rulings and interpretations issued by an agency head in response to nonhypothetical questions after the agency's interpretative action has come to an end are final for the purpose of preenforcement review because the review will not disrupt the orderly process of agency adjudication where the ruling, intended as a deliberative interpretation of the agency's position at the highest level on a question of importance, has issued. *Id.* at § 486.

Here, Nationwide has no choice but to comply with HUD's erroneous assertion of claims involving the "disparate impact" approach or face severe penalties. Further, HUD has left no doubt as to the application of the "disparate impact" approach to Fair Housing Act cases, especially property insurance cases. Nationwide's Petition at App. 135 to App. 152 details HUD internal memoranda, Congressional testimony, statements at public meetings, and legal memoranda filed in court, all stating unequivocally that HUD will apply a "disparate impact" approach to property insurance. In light of these documents, the

assertion that HUD's action is not final is at best intellectually dishonest.

There is no doubt the issue of whether HUD's assertion of the "disparate impact" approach to property insurance is ripe for judicial review. To state otherwise is to deny the reality of how HUD approaches property insurance cases. The Court should avoid the harm caused to policyholders and claimants by the use of the "disparate impact" approach, which weakens insurer solvency.

CONCLUSION

HUD's assertion of claims which utilize the "disparate impact" approach makes it impossible for Ohio to implement its laws permitting rationally based, neutral risk selection criteria and the equitable allocation of risks rejected by the voluntary market through its FAIR plan. These laws are vital to insurer solvency. HUD cannot use the Fair Housing Act – which does not specifically relate to insurance – to impair, invalidate, or supersede Ohio's insurance laws. The Court should grant Nationwide's Petition.

Respectfully Submitted,

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